SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 843

SAFEWAY TRAILS, INC.,

Petitioner,

vs.

AARON E. GREENLEAF.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Safeway Trails, Inc., prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit, entered in the above-entitled case on March 21, 1944 (R. 244).

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit is not yet officially reported, but appears at page 234 of the Record.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Second Circuit was entered March 21, 1944 (R. 244). The

jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

Was the failure to join as defendant below Eastern Trails, which was jointly liable with petitioner, a defense to the present action? Eastern Trials, Inc., was subject to the jurisdiction of the District Court as to both service of process and venue and capable of being made a party without depriving the District Court of jurisdiction of the present parties.

Was petitioner, as defendant below, entitled to a dismissal of the complaint on the merits on the ground that the making of an audit by a certified public accountant was a condition precedent to defendant's liability under the terms of the contract alleged in the complaint?

Was petitioner, as defendant below, entitled to a dismissal of the complaint on the merits on the grounds that the contract alleged was not made by anyone authorized to act on defendant's behalf and that the unauthorized acts of those who assumed to act on its behalf were not ratified?

Statutes and Rules of Court Involved.

Act of June 19, 1934, Ch. 651 (48 Stat. 1064), U. S. C., Title 28, Secs. 723 b, 723 c.

Rules 19(a) and 19(b) of Federal Rules of Civil Procedure.

RULE 19.

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses

to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance, or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

Statement of Case.

On October 22, 1940, Aaron E. Greenleaf, plaintiff below, and certain other persons (R. 24), entered into an agreement in writing which included the following provisions:

"(6) The parties agree that there shall be made within a reasonable time an audit by a certified public accountant of the books and accounts of Safeway Trails, Inc., and Eastern Trails, Inc., and that any amounts found to be due and owing to the party of the first part (Aaron E. Greenleaf) by Eastern Trails, Inc., shall thereupon be represented by a negotiable promissory note, payable with interest at Five (5%) Per cent per annum on unpaid balances to the party of the first part in amounts of Five Hundred ($500.00) Dollars per month, including interest, until paid in full."

Subsequently, with the approval of the president of defendant and three other persons who shortly thereafter became

directors of defendant, counsel for defendant and for Eastern Trails signed and delivered to counsel for plaintiff a letter containing the following language (R. 32):

> "In Clause (6) of the agreement of October 22, 1940, there is provision for the payment to Mr. Aaron E. Greenleaf of the sums due him by Eastern Trails, Inc. and Safeway Trails, Inc. as they may appear from a proper audit therein provided for. Mr. Schnebly has agreed that the audit of these accounts will be commenced immediately as soon as he can secure an accountant at a reasonable price. In the meantime, as counsel for each company and as a party under the agreement, I agree with you that the corporations will cause to be executed a note providing for payment of the total sum when found by the audit at the rate of Five Hundred ($500.00) Dollars per month, including interest at the rate of Five (5%) Per Cent, per annum, said interest to be computed from the date of the note, but the amount of the note to embrace prior interest due. The note will be so drafted as to provide that upon failure to pay any monthly sum on the day when due, Mr. Greenleaf may give notice in writing to the corporations liable on the note and if the overdue payment is not made within thirty (30) days from the date of the notice, the entire balance of the note including interest to date of payment will be accelerated and become due and payable."

Since October 22, 1940, there has been no audit by a certified public accountant or by anyone else of the account of the plaintiff with Eastern Trails and the books of Eastern Trails have not been in such condition as to enable anyone to make an audit of such account (R. 218).

No note has been made by either Eastern Trails or Safeway Trails, but Eastern Trails has made certain payments to plaintiff on account of its indebtedness to him (R. 217).

On October 22, 1940, Eastern Trails was and it ever since has been and still is a New Jersey corporation doing busi-

ness in the Southern District of New York, subject to the jurisdiction of the District Court for the Southern District of New York as to both service of process and venue. Throughout the pendency of the action in the District Court, Eastern Trails could have been made a party thereto without depriving the Court of jurisdiction of the present parties and was not made a party thereto (R. 218-219).

There has been no action at any time by the board of directors or at a meeting of stockholders of Safeway Trails with respect to the making of the agreement which counsel for defendant and Eastern Trails purported to make in the above-mentioned letter.

The District Court held:

(1) Eastern Trails had and has a joint interest with the defendant in an action on the indebtedness of Eastern Trails to the plaintiff or on any promissory note to the plaintiff by the defendant and Eastern Trails for the amount of such indebtedness (R. 219).

(2) The failure of the plaintiff to make Eastern Trails a party to the action ousts this Court of jurisdiction of the present action (R. 219).

(3) The contract alleged in the complaint was in fact made by defendant (R. 216).

(4) An audit by a certified public accountant of the account of the plaintiff with Eastern Trails was a condition precedent to the maintenance of an action by the plaintiff on account of the indebtedness of Eastern Trails to the plaintiff or upon any promissory note by the defendant and Eastern Trails for the amount thereof (R. 219).

The Circuit Court of Appeals reversed, holding that even though the obligation is joint (R. 235), it was unnecessary to join Eastern Trails as a defendant because a judgment could be rendered against Safeway Trails alone without in-

justice to it; that the making of the audit was not a condition precedent to liability, and that if it were, the condition had been waived. In a concurring opinion by Judge Clark, it was held that Eastern Trails was merely a "proper party", and was the unimportant and dominated part of the combine, rather than a co-equal promisor (R. 239).

Specification of Errors to Be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that Eastern Trails was not a necessary party to the action pursuant to the provisions of Rule 19(a) and (b) of the Rules of Civil Procedure.

(2) In holding that the agreement made by counsel and the other persons was binding on defendant without action by its board of directors or at a meeting of its stockholders.

(3) In holding that the making of an audit was not a condition precedent to liability under the agreement alleged, and that such condition precedent had been waived.

(4) In reversing the judgment of the District Court.

BRIEF IN SUPPORT OF PETITION.

(a) The Circuit Court of Appeals held, that even though the liability of Eastern Trails and Safeway Trails under the contract alleged was joint, they did not have a "joint interest" as defendants within the meaning of Rule 19. It is respectfully submitted that this was error.

In the opinion of Judge Swan (R. 235) the following statement is made with respect to non-joinder of Eastern Trails as defendant:

> "* * * we shall assume with the district court that the contract made them only joint obligors * * * However, we do not believe that Rule 19(b) required Eastern to be made a party. The condition of its applicability is that the absent party is a necessary party in order that complete relief may be accorded between those already parties * * *"

Judge Swan erred in thinking that non-joinder of Eastern was based only upon Rule 19(b). On the contrary, it was based principally upon Rule 19(a) although Rule 19(b) does furnish additional grounds for such joinder. Rule 19(a) unqualifiedly states that "persons having a joint interest shall" (not may) "be made parties and be joined on the same side as plaintiffs or defendants." This is a clear and positive requirement of plaintiff as a condition precedent to the filing of his action, and as found by the District Court (R. 212-213). The only condition to be met in making Rule 19(a) applicable is that the parties have a "joint interest". This the District Court found with respect to Safeway Trails and Eastern Trails and the Circuit Court has assumed it to be true (R. 235).

Rule 19(b) is more liberal than Rule 19(a) in that it unequivocally requires the Court to make those persons parties who "ought to be parties" even though they are not indispensable. All that is necessary for this requirement to be-

come applicable is that it appear that Eastern "ought" to be a party if "complete relief" is to be accorded "between those already parties." As to persons who "ought" to be parties, Rule 19(b) says that "the court *shall*" (not may) "order them summoned to appear in the action" if the absent party is subject to the jurisdiction of the court as to both service of process and venue, as in the case of Eastern Trails and if such joinder does not deprive the court of jurisdiction of the parties before it. No one has contended in these proceedings that joinder of Eastern Trails would oust the court of jurisdiction over petitioner or respondent, nor would such be the case.

In the above excerpt from Judge Swan's opinion, he, in effect, states that the primary consideration in requiring joinder of parties is in order that "complete relief" be accorded "between those already parties." However, complete relief to plaintiff, as granted by Judge Swan, is not complete relief to Safeway Trails, who was as much "already a party" as plaintiff, unless he considers that Safeway Trails is afforded complete relief by being held solely liable for the debts of a third party which, if the corporate fiction be penetrated, is substantially identical with the plaintiff. The defendant requested the plaintiff to name Eastern Trails as a defendant, but the plaintiff naturally declined to do so in view of the fact that Eastern Trails is controlled by the plaintiff and is owned by the plaintiff to the extent of one thousand (1,000) shares of a total of 1,100 shares of its stock (R. 25, 34). In the circumstances, Eastern Trails could not have been successfully brought in as a third party defendant. While Rule 14 permits a defendant to implead a third party as defendant, such action is merely permissive and not of right. As stated in Volume 1 of Moore's Federal Practice, at pages 743 and 748 (See also 1942 Supplement, pgs. 687-688):

> "The third party defendant does not, merely by the impleader, become an original defendant. The rule states that the plaintiff may amend his pleadings to assert a claim against the impleaded party under certain circumstances; but it does not compel him to proceed against the impleaded party."

See also *Crim* v. *Lumbermen's Mutual Casualty Company,* 26 F. Supp. 715. In the case of *Satink* v. *Holland Tp. et al. (Lehigh Valley R. Co. et al., Third Party Defendants)*, 31 F. Supp. 229, it was held:

> "Where a third party defendant is brought in on the ground that he is primarily liable to the plaintiff, but the latter declines to amend his complaint so as to ask for relief against the third party defendant, the order granting leave to bring in the third party should be vacated."

By the failure of the plaintiff to join Eastern, this defendant not only is deprived of having the benefit of any defenses that could have been asserted by Eastern to this claim, but is also put to the necessity of filing a separate suit, when all rights could have been litigated in one action.

It was the intention in adopting the Federal Rules of Civil Procedure to avoid, if possible, a multiplicity of suits. As was stated in Volume 2 of Moore's Federal Practice, page 2143:

> "Under the common law rules joint obligees were indispensable parties; joint obligors were not but had to be made parties defendant if subject to the jurisdiction of the Court."

citing in support thereof *Camp* v. *Gress,* 250 U. S. 308, 39 Sup. Ct. 478, 63 L. Ed. 997, and *Leyden* v. *Owen,* 150 Mo. App. 102, 129 S. W. 984. The author continues with the observation that

"The same rule would now hold good."

See also Volume 2 of Moore's Federal Practice, page 2160.

This appears to be recognized in the opinion of Judge Clark (R. 239), since the failure to join Eastern is referred to as a "defect," but in that opinion it is said that enforcement of the Rule should be denied because the Judge of the District Court was "overpersuaded" to hold that Eastern was "indispensable." It is respectfully submitted that the District Court held that Eastern Trails had a "joint interest" with Safeway Trails and was a "necessary party" and that it did so not from persuasion but from its intimate knowledge of the evidence gained at the trial to which the learned judges of the Circuit Court of Appeals did not have first hand access. It is urged that a finding by the District Court upon its intimate knowledge of the evidence that parties have a "joint interest," which is the condition of applicability of rule 19(a), or that parties "ought" to be parties, which is the condition of applicability of rule 19(b), should not be disturbed unless contrary evidence in the record is so overwhelming as to make it obvious that such findings were clearly erroneous.

What the Circuit Court has done has been to nullify both Rule 19(a) and 19(b). It is respectfully submitted that the Circuit Court of Appeals has, in so construing Rule 19, decided an important question of Federal law which has not been but should be settled by this Court, and has in its decision so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

(b) The contract in suit is a contract to assume the indebtedness of another corporation. Clearly, this was not a transaction in the ordinary course of the corporation's business. If it had been sought to accomplish this

purpose by merger of the two corporations, it would have required a vote of at least a majority of the stockholders of the defendant at a meeting duly called for that purpose; it clearly is a contract of a kind which required action at least by the board of directors. As was stated in Volume 5 of Fletcher Cyc. of Corporations, page 352:

> "The directors or trustees of a corporation are vested with its management, not as individuals, but as a board, and, as a general rule, they cannot act so as to bind the corporation only when they act as a board and at a legal meeting; and the acts of the majority of the board as individuals and other than at a meeting are ordinarily ineffective. It follows that the director or trustee of a corporation is not individually the agent of the corporation and has no power individually to bind it by any contract or to act for the corporation, even though he owns a large majority or portion of the corporate stock."

To the same effect see 13 Am. Jur. 909. In the case of *Union National Bank* v. *State National Bank,* 155 Mo. 955, 55 S. W. 989, 78 Am. St. Rep. 560, it was held:

> "The fact that the president of the corporation owned the entire capital stock of the corporation does not authorize him to execute a corporation mortgage without the action of the directors."

And in the case of *Kessell* v. *Murray,* 196 N. W. 591, 33 A. L. R. 1351, it was held:

> "Directors are without authority to act in representative capacity except as a board of directors."

In this case there never was a formal meeting of the board of directors of the defendant in which any action was taken to authorize or ratify the agreement of October 22, 1940. As stated in 13 Am. Jur., page 909:

> "The authority of directors or trustees is conferred upon them as a board, and they can bind the corpora-

tion only by acting together as a board. A majority of them in their individual names cannot act for the board itself and bind the corporation. In order to exercise their powers they must meet so that they may hear each other's views, deliberate, and then decide. They must act as an official body."

See also *Schwartz* v. *United Merchants & Manufacturers*, 72 Fed. 2d 256, *Tabenhouse* v. *International Oxygen Company*, 74 Fed. 2d 748, *Jackson* v. *County Trust Company of Maryland*, 176 Md. 505, 6 Atl. 2d 380.

There was no evidence of ratification. All of the acts relied upon by plaintiff as evidence of ratification were the acts of individuals for their own benefit which Safeway neither enjoyed nor had power to prevent. As stated in *Farmers State Bank* v. *Haun*, 30 Wyo. 322, 222, Pac. 45:

> "Ratification is impossible unless the party has a real choice to ratify or not to ratify."

The defendant received no benefit from this agreement, but any benefit that may have been derived was for the individuals and not the corporation. As was stated in *Franco-Texas Land Company* v. *McCormick*, 85 Tex. 416, 23 S. W. 123, 34 A. S. R. 815:

> "Of course this rule (of ratifying by retaining benefits) does not apply unless the money or property is received by the corporation, or appropriated to its use through some corporate agency."

See also Volume 2, Fletcher Cyc. of Corporations, page 832.

In *Brinson* v. *Mills Supply Company, Inc.*, *supra*, it was held:

> "That the rule does not apply where no benefit results from transaction or where corporation receives benefit from separate transaction."

It is contended that in the cases which hold

> "A corporation by accepting the benefits of a contract of guaranty within its implied powers and made by its president for it but without authority thereby ratifies it."

as stated in the case of *Squaw Gulch Mining & Milling Co.* v. *Knollberg,* 286 Pac. 822, deal with those cases in which the president or directors act "within their implied powers". In the instant case, as has been hereinbefore stated, the contract was not only unauthorized, but not within the implied powers of the individuals who attempted to make it.

(c) The condition with respect to the audit was an express condition. The law has no concern as to whether its nonfulfillment was or was not of practical importance for the defendant can be bound only so far as it has consented to be.

> Restatement of the Law of Contracts, Sec. 395; Williston on Contracts, Revised Ed., Sec. 1970.

There was no evidence of waiver. No act whatever of Safeway manifesting any intention to stand upon the contract was proved after the date of the discovery of the impossibility of making the audit.

The audit was necessary to ascertain the extent of the joint obligation the defendant was expected to assume. Can it be said that defendant intended to assume jointly with Eastern the latter's obligations before such an audit was made by a certified public accountant? Could defendant have known all of the facts without such audit so that it can be said the corporation ratified the unauthorized acts of the individuals? As stated in Volume 2 of Fletcher Cyc. of Corporations, page 838:

> "But it is essential to implied ratification from acceptance and retention of benefits that it and the ac-

ceptance of the benefits be with knowledge of all the material facts."

See also *Brinson* v. *Mills Supply Company, Inc.*, 219 N. C. 505, 14 S. E. 2d 509.

Judge Clark recognized (R. 238-9) that

"It was a part of the agreements at the basis of this action that Eastern was to be merged in defendant."

It is earnestly contended that the defendant could not proceed with such merger until an audit had been made so that Safeway could learn the extent of the obligation to be assumed.

Upon these questions of substantive law, it is respectfully submitted that the Circuit Court of Appeals has decided important questions of local law in a way probably in conflict with applicable local decisions.

Wherefore, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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SAFEWAY TRAILS, INC.,
Petitioner,

vs.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF.

LOUIS H. SHEREFF,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES

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against

AARON E. GREENLEAF.

Respondent.

RESPONDENT'S BRIEF.

Statement.

The Contract, its Making and Ratification.

The making, ratification and breach of the contract sued on, was found both by the District Court and the Circuit Court of Appeals. These are the facts:

In October, 1940, respondent owned practically all of the stock of one Eastern Trails, Inc. and the controlling stock of petitioner (R. 40, 41). Both companies were motor carriers operating between New York and Washington, and at that time there was in existence a contract for their merger which had been approved by the Interstate Commerce Commission (R. 195). Eastern was indebted to respondent on demand notes bearing 6% interest (R. 173, 174). It was insolvent, which condition continued to the

date of the trial (R. 134). Respondent sold his controlling stock in petitioner to persons who were its minority stockholders, and who then became the owners of a substantial majority of its stock. One of these (Schnebly) was then its president and director. The others immediately became the entire board of directors (Ex. 6, R. 175).

Petitioner requested respondent to give it control over Eastern for a period of two years. Respondent did turn over such control to petitioner by giving Schnebly, its president, an irrevocable proxy to vote his stock in Eastern (Ex. 5, R. 31). As consideration for turning over such control, petitioner agreed to assume Eastern's indebtedness to respondent, and execute with Eastern, a note to respondent for the amount of the indebtedness, payable at the rate of $500.00 per month, with interest at 5% per annum (R. 49, 51, 52, 54). The note was never executed.

Petitioner did exercise control over Eastern and operated it as part of its organization. It exercised the proxy and elected its own board of directors as the directors of Eastern (R. 133). It used Eastern's equipment (R. 135) and used Eastern's local franchise rights in New Jersey (R. 143). While in control of Eastern, petitioner caused Eastern to make some of the monthly payments with 5% interest, to respondent. The action was brought for breach of the agreement to execute the note.

The Alleged Condition Precedent

The written portion of the agreement sued on required petitioner to make a certified audit of the books of Eastern. Petitioner admitted in the Circuit Court that that was its obligation and not respondent's, and the Circuit Court so found (R. 237). Although petitioner claims that the audit was an express condition, there is nothing in the record to show that it was.

The books were in such condition that an audit was impossible. However, petitioner did make an investigation of respondent's account with Eastern. This was done by its president and treasurer and Eastern's treasurer. Two of these were accountants, though not certified (R. 132). Petitioner notified respondent that it had examined Eastern's books and found that the indebtedness to him was $18,395.53 as of January 15, 1941, and sent him a transcript of the account (Ex. 7, R. 177). Petitioner's counsel wrote respondent excusing the delay in making the $500.00 monthly payments, and said (Ex. 9, R. 181):

> "* * * we should be able to make the payments right on the dot. You may rest assured that we will see that they are made in accordance with the agreement."

And further (R. 182):

> "In any event, the thing that you want is to receive your money and you may rest assured that the monthly payments will be made by Eastern Trails in accordance with the agreement."

Although petitioner refused to pay respondent it never based its refusal upon the ground that a certified audit had not been made. Its refusal was based purely on the ground that it had not made the agreement.

The Circuit Court of Appeals decided that the making of the audit was not a condition precedent and even if it were, it was waived both by the statement of account and by continuing to accept the benefits of the contract (R. 237).

Claim of Alleged Non-Joinder.

Petitioner contends that its liability was a joint one with Eastern and that such joint indebtedness was the "joint interest" referred to in Rule 19a. It contends that because

its joint obligor was not joined as a party defendant, respondent could not recover. It made no attempt to bring in Eastern as a party. Respondent contended in the courts below that the indebtedness was not a joint one but joint and several, and further, that the words "joint interest" did not mean a joint obligation—but such a joint interest in a *res* that a court cannot make a determination without unjustly affecting the rights of the absent party. The majority opinion of the Circuit Court did not decide that the indebtedness was joint. It merely assumed it (R. 235). The concurring opinion held that Eastern and Safeway were not co-equal promisors and that Eastern was only a formal party (R. 239).

Point I.

The Evidence Clearly Established that the Contract Was Made, Ratified and Breached.

Both the District Court and the Circuit Court of Appeals found that the contract sued on was made, ratified by the continuing acceptance by the petitioner of its benefits, and was breached. This Court will not reverse the concurrent findings of both lower courts unless clearly shown to be erroneous. *Dun* v. *Lumbermen's Credit Assn.*, 209 U. S. 20.

Petitioner claims that a formal meeting of its board of directors was necessary to make or ratify the contract. Although as a general rule directors should act collectively at a meeting and not individually, this rule often given way to the facts of a case. Where the directors are of one mind and are also the controlling stockholders, and act together in making and approving the contract (as they did here), a formal meeting is not necessary. *Gerard* v. *Empire Square Realty Co.*, 195 N. Y. App. Div. 244.

The president of petitioner actively participated in making the contract. This case is squarely within the decision

of this Court in *Sun Printing & Publishing Assn.* v. *Moore*, 183 U. S. 642, 651. The *Sun Printing* case is followed in Maryland (where petitioner is incorporated). *Eastern Rolling Mill Co.* v. *Michlovitz*, 157 Md. 51.

Corporate ratification of a contract made by parties without authority does not require a formal meeting of its board of directors. In *Western Union Battery & Supply Co.* v. *Hazelett Store Battery Co.*, 61 Fed. (2d) 220, cert. den. 228 U. S. 608, the Court said, p. 229:

> "* * * the ratification of acts done on behalf of the corporation may be made very informally, by a majority of the board of directors individually."

and further held that ratification will be implied from the acceptance and retention by the corporation of the benefits of the contract. This is also the law of Maryland. *Webb* v. *Duval*, 177 Md. 592. *Jackson* v. *County Trust Co.*, relied on by petitioner is not in point. That case dealt with the sufficiency of an affidavit, which a statute required to be made by an officer. The affidavit was made by a director and the court held it was not sufficient. The other cases cited by petitioner are clearly distinguishable upon their facts.

Petitioner contends (p. 14) that on questions of substantive law the Circuit Court of Appeals decided important questions of local law "in a way probably in conflict with applicable local decisions." Such "probable" conflict is not shown in its brief. This Court has held that where lower Federal Courts are applying local law, it will not set aside their ruling, except on a plain showing of error. *Palmer* v. *Hoffman*, 318 U. S. 109, 118.

Point II.

The Making of a Certified Public Accountant's Audit Was Not a Condition Precedent, and Besides Was Waived.

The audit was an obligation on the part of petitioner and not respondent. It was not a consideration going into the making of the contract. Its purpose was to determine the correct amount due (R. 183). The obligation had already become fixed and absolute (R. 90). The obligation to assume and pay the debt had been arrived at independently of the audit and did not depend on it. An excellent definition of condition precedent is found in *New Orleans* v. *Texas & Pac. Ry. Co.*, 171 U. S. 312, 334, and after stating the definition, this Court said:

> "The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may be safely inferred as to the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side."

Courts are disinclined to construe stipulations as conditions precedent. Williston on Contracts, Sec. 671; *Southern Surety Company* v. *McMillen Co.* (C. C. A. 10), 58 Fed. 541, 548; Rest. Law of Contracts, Sec. 257. In *Green County* v. *Quinlan*, 211 U. S. 582, the words "upon condition" were interpreted not to be a condition precedent. See also *M. O'Neil Supply Co.* v. *Petroleum Heat & Power Co.*, 280 N. Y. 50; *Mascioni* v. *I. B. Miller, Inc.*, 261 N. Y. 1.

The action of petitioner in acknowledging the existence of the agreement and arranging payments to be made under its terms (Ex. 7, R. 177, Ex. 9, R. 181) is a practical construction of the agreement that the audit was not a condition precedent. If it were one, petitioner would not have caused these payments to be made. Such a practical con-

struction is part of the contract. *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Carthage T. P. Mills* v. *Village of Carthage*, 200 N. Y. 1.

The Circuit Court held that if the audit can be considered to be a condition precedent, it was waived both by the statement of account and by continuing to accept the benefits of the contract. This has long been the law. Williston on Contracts, Sec. 687; Rest. of Law on Contracts, Sec. 292. Since both the District Court and Circuit Court of Appeals found that the petitioner accepted the benefits of the contract, the waiver must logically follow.

Respondent further showed below that petitioner repudiated the contract—not upon the ground that a certified public accountant's audit was not made—but upon the express ground that the contract was not made (R. 182). For the first time, at the trial, petitioner claimed that its own failure to make the audit exonerated it from performance. This Court said, in *Railway Co.* v. *McCarthy*, 96 U. S. 258, 267:

> "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

On this point also, petitioner has shown no reason why the writ should be granted.

Point III.

Even If Petitioner and Eastern Were Joint Obligors They Do Not Have a "Joint Interest" Within the Meaning of Rule 19a R. C. P.

In the Federal Courts parties are divided into three classes, (1) proper; (2) necessary; and (3) indispensable.

These classes are well defined in *State of Washington* v. *U. S.*, (C. C. A. 9) 87 Fed. (2d) 421, 425-428. The sole test of indispensability is whether the absent party's interest is affected by the decree. If his interest is not affected he is not indispensable.

The Circuit Court did not assume, as petitioner states, (p. 7) that it and Eastern had a "joint interest." All it assumed was that they were joint debtors. The District Court believed that joint debtors were "jointly interested" although he was not confident of this interpretation (R. 213). This Court has consistently held from early days that joint obligors are not indispensable parties. *Barney* v. *Baltimore,* 6 Wall. 280, 287; *Camp* v. *Gress,* 250 U. S. 308. Such has been the unanimous holding of the lower federal courts in every circuit where this problem arose. See the following: *Samuel Goldwyn, Inc.* v. *United Artists Corporation,* (C. C. A. 3) 113 Fed. (2d) 703; *Anglo California National Bank* v. *Lazard,* (C. C. A. 9) 106 Fed. (2d) 693, 699; *McAlister* v. *Fidelity and Deposit Company of Maryland,* 37 Fed. Supp. 956; *Ostrander* v. *Blandin,* 211 Fed. 733; *Wyoga Gas & Oil Corp.* v. *Schrack,* 27 Fed. Supp. 35, id. 29 Fed. Supp. 582; *Atlas Beverage Co.* v. *Minneapolis Brew. Co.,* (C. C. A. 8), 113 Fed. (2d) 672, 675; *Gandia* v. *Porto Rico Fertilizer Co.* (C. C. A. 1), 291 Fed. 18 Cert. den. 263 U. S. 711; *Buss* v. *Prudential Insurance Co.,* (C. C. A. 8), 126 Fed. (2d) 960; *Texas* v. *Wall,* (C. C. A. 7), 107 Fed. (2d) 45; *McRanie* v. *Palmer,* 2 F. R. D. 479; *Stuff* v. *La Budde Feed & Grain Co.,* 43 Fed. Supp. 493, 495; *Spanner* v. *Brandt,* 1 F. R. D. 555; *Ford* v. *Adkins,* 39 Fed. Supp. 472; Moore's Federal Practice, Vol. 2, p. 2142.

The action was commenced in the State Court where the rule is the same. Section 192, New York Civil Practice Act. *Pickhardt* v. *First National Bank,* 206 App. Div. 781.

Petitioner makes much ado about the fact that the Circuit Court reversed the District Court on an alleged finding of fact that the parties were jointly interested. This is misleading. There was no such finding of fact. As a conclusion of law, the District Court decided that a joint debt was a "joint interest" and that the failure to join one of two joint debtors ousted the court of jurisdiction (R. 219). Petitioner's present claim that the Circuit Court in reversing the District Court on a question of law such as this has "departed from the accepted and usual course of judicial proceedings" is absurd.

Petitioner has not cited one case indicating that joint obligors have such a joint interest that either is an indispensable party to an action against the other. The weight of authority is to the contrary. On this point petitioner has also failed to show any ground why the writ should be granted.

POINT IV.

The Appeal Is Frivolous and Is Made Solely to Delay Respondent's Recovery.

The result of the decision of the Circuit Court is to award a judgment in favor of respondent for a substantial sum of money. By filing this application for the writ, petitioner has successfully delayed proceedings on the judgment, which delay will continue for some time. Petitioner has not shown any ground for an application for writ of certiorari. He has not shown any conflict between the decision below and the decision of any other Circuit Court. To the contrary the decision below follows the weight of authority. Petitioner has not shown any conflict between the decision below and the local state courts, whether it be New York or Maryland. To the contrary the decision follows the authority in both of these states. Petitioner has

not shown that this decision is in conflict with applicable decisions of this court. To the contrary it conforms with the previous decisions of this court. Petitioner has not shown that the Circuit Court has departed from the accepted and usual course of judicial proceedings. Petitioner has failed to cite one case which will sustain its point of view on any of the grounds upon which the petition is made. Beyond its bare conclusory statements, the petition and the record do not show any reason why this writ should be granted.

Since this application has delayed proceedings on the judgment of the lower court, and it is quite obvious that it has been sued out merely for delay, respondent prays that damages be awarded against petitioner for 10% of the judgment in accordance with Rule 30, subdivision 2 of the rules of this Court.

Respectfully submitted,

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